19-7524

Case No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: LEXTER KENNON KOSSIE,

Petitioner,

Vs.

BRYAN COLLIER, Director
Texas Department of Criminal
Justice-Institutional Division,

Respondent.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. 2254(a)

/s/ Lexter Kossie

LEXTER KENNON KOSSIE
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PRO SE PETITIONER

QUESTIONS PRESENTED

1) Whether the Court's 'equitable' ruling permits Texas prisoners to avoid the successive requirements found at 28 U.S.C. § 2244(a) and (b) regarding prior §2254 applications for a writ of habeas corpus, by invoking the exception to the general rules of procedural default as stated in **Trevino v. Thaler**, 569 US 413 (2013) and **Martinez v. Ryan**, 566 US 1 (2012)?

2) Whether trial counsel renders constitutional performance by proceeding to the punishment trial only 45 minutes after the guilty verdict under the circumstance of this particular case?

3) Whether the Court should presume prejudice when trial counsel decides to not present mitigation factors without making a mitigation investigation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases: Page

State Cases:

Supreme Court Cases:

State Statutes:

Tex. Code Crim.Proc.,art.11.07

Tex. Code Crim.Proc.,art.37.07 § 39a)(1)

Tex. Penal Code, § 8.04(b)

Supreme Court Statutes:

Title 28 U.S.C. § 1651(a)

Title 28 U.S.C. § 2244

Title 28 U.S.C. § 2244(3)(A)

Title 28 U.S.C. § 2254

I.

COURT'S APPELLATE JURISDICTION

A. The Writ Will Be In Aid Of The Court's Appellate Jurisdiction

Issuance by the Court of an **"original"** § 2254 writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. In **Trevino v. Thaler**, the Court wrote: "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective", 133 S.Ct. 1911 (2013). **Trevino**, unlike the vast majority of Texas prisoners was bringing an **"initial"** application for a writ of habeas corpus under § 2254. Thus, the Court's discretionary powers is necessary to determine whether the Court's **"equitable"** ruling permits Texas prisoners to avoid the successive requirements found at 28 U.S.C. § 2244 (a) and (b) regarding prior § 2254 applications for a writ of habeas corpus, by invoking the exception to the general rules of procedural default as contemplated by **Trevino.**

B. Exceptional Circumstances Warrant The Exercise Of The Court's Discretionary Powers

Before a second or successive application permitted by § 2244 is filed in the district court, the applicant **"SHALL"** move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(3)(A). The court of appeals may authorize the filing of a successive § 2254 application **only** if the applicant makes a prima facie showing that his claim was not presented in a prior application and (1) his claims relies on a new rule of constitutional law, made retroactive to

cases on collateral review by the Supreme Court, that was previously unavailable; or (2) his claim relies on a new factual predicate. § 2244(b)(2),(b)(3)(C). **Trevino** does not provide a basis for authorization under § 2244(b)(2)(A), as the Court's decision was an **'equitable ruling'** that did not establish **'a new rule of constitutional law'. Adams v. Thaler**, 679 F.3d 312, 323 n.6 (5th Cir.2012)(quoting **Martinez**, 132 S.Ct. at 1319. Because **Trevino** was merely an application of **Martinez's** equitable rule, it likewise did not establish a new rule of constitutional law. See **Trevino**, 133 S.Ct. at 1915-21.

The **"gatekeeping"** mechanism created by § 2244 that allows a court of appeals to authorize the filing of a second or successive application in the district court has put limitations on Texas prisoner's ability to file habeas petitions in the district court to receive the benefits of the **Trevino** 'equitable ruling' which permitted federal habeas corpus courts to consider defaulted claims of ineffective assistance of trial counsel. This raises **"exceptional circumstances"** that warrants the exercise of the Court's discretionary powers to circumvent §2244's requirements for filing a second or successive petition in the district court by remanding this **'original'** § 2254 habeas corpus petition to the Southern District Court of Texas For Corpus Christi Division where Petitioner is being held.

C. Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court

There is no other available remedy to have Petitioner's defaulted 'ineffective-assistance-of-trial-counsel'claims considered on the merits, other than the court remanding the instant original § 2254 petition to the district court for an evidentiary hearing, in order that the claims may be develop for collateral review.

D. Reasons For Not Making Application To The District Court Of The District In Which Petitioner Is Being Held

Before a second or successive application permitted by § 2244 is filed in the district court, the applicant SHALL move in the appropriate court of appeals for an order authorizing the district court to consider the application. On August 15, 2017, the Fifth Circuit Court of Appeals denied motion for an order authorizing the United States District Court for the Southern District of Texas to consider a successive 28 U.S.C. § 2254 application. See ORDER at **APPENDIX "A"**. Consequently, the denial of motion for authorization is not appealable. See 28 U.S.C. § 2244(E)

II.

PETITIONER'S CLAIMS ARE EXHAUSTED

During the pendency of Petitioner's direct appeal, he filed two state habeas corpus applications in re:Cause Nos.679887-A and -B. The Texas Court of Criminal Appeals(TCCA) dismissed the applications as being premature. See generally, **Ex parte Kossie,** Application Nos. 10,978-09 and -11. The applications were denied on March 15, 1995 and June 7, 1995, respectively. After his direct appeal was affirmed on March 13, 1997, Petitioner filed, in essence, his **"initial"** state habeas corpus application raising various claims regarding trial counsel's ineffectiveness at the guilt and punishment stages of the trial. The **TCCA** granted relief in the form of an out-of-time appeal thereby dismissing all other claims regarding trial counsel's ineffectiveness as being premature. See **Ex parte Kossie**, Application No. 10,978-12 (Trial Court No.679887-C). In 2013, before the Court made an equitable ruling for Texas prisoners regarding claims of ineffective assistance of trial counsel in **Trevino,supra.**, Petitioner had

already filed several state applications, some with an attorney but the majority were filed without the assistance of an attorney. After discovering the Court's 'equitable ruling' in **Trevino,supra.,** Petitioner filed two more state applications. In those applications Petitioner raised new claims regarding trial counsel's ineffectiveness. He claim that his trial counsel rendered ineffective assistance by (1) not preparing for the sentencing trial (2) failed to inquire into whether he had a desire to testify at the punishment phase (3) failed to inquire into whether he had character witnesses that were available for the punishment phase (4) failed to investigate his background and present mitigating evidence for the jurors to consider in assessing the appropriate punishment and (5) failed to discuss any sentencing trial strategy. The (TCCA) dismissed both applications as being procedurally barred under § 4, Tex.Crim.Proc. Code,art.11.07. See **Ex parte Kossie**, Application Nos.10.978-27 and 10,978-28 (Trial Court Nos.679887-S and 679887-T). The applications were dismissed on April 8, 2015 and July 8, 2015, respectively. Thus, the claims presented herein are exhausted through state court collateral review proceedings.

III.

CONFINEMENT AND RESTRAINTS

Bryan Collier, **Respondent-Director** of the Texas Department of Criminal Justice has unlawful custody of Petitioner pursuant to a void judgment and sentence from the 185th District Court of Harris County , Texas re:Cause No.679887 whereas on November 29, 1994, a jury convicted Petitioner of aggravated robbery by using and exhibiting a deadly weapon to-wit: a firearm. Subsequently, the jury assessed punishment at life imprisonment at (TDCJ).

IV.

PETITIONER IS IN CUSTODY IN VIOLATION OF THE UNITED STATES CONSTITUTION

Petitioner's Sixth Amendment right was violated whereas trial counsel was ineffective during the punishment phase in failing to (1) prepare for sentencing; (2) discuss any sentencing strategy with Petitioner; (3) advise Petitioner of his right to testify at sentencing and determine whether he wished to exercise that right; (4) investigate,develop,or present mitigation evidence at sentencing;and (5)inquire whether Petitioner had any character witnesses to testify on his behalf and present such testimony at sentencing.

V.

PETITIONER'S DEFAULTED CLAIMS ARE EXCUSED

In **Trevino,supra,** the Court wrote: "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial, if in the initial review collateral proceeding,there was no counsel or counsel in that pro- was ineffective." 566 U.S.; at ___(slip op.15)

Petitioner contends that during his first appeal,as of right, under **Evitts v. Lucey,** 105 S.Ct. 830 (1985), the State of Texas did not provide Petitioner a meaningful opportunity to present his claims regarding trial counsel's ineffectiveness during his criminal trial, on direct appeal. Instead, Petitioner had to raise his claims regarding trial counsel's ineffectiveness in a state application for writ of habeas corpus. The State of Texas did not conduct an evidentiary hearing to develop the records,thus without the assistance of an attorney the claims were not properly briefed. Besides the record was undeveloped thus the (TCCA) denied

relief without a written order. See, generally, state application No. 679887-D, which was denied on November 25, 1998. Petitioner then filed two state applications raising various claims of trial counsel's ineffectiveness in which the (TCCA) dismissed those applications as being procedurally barred under Tex. Code Crim. Proc.,art.11.07 on August 14, 2002 and June 25,2003,respectively. See, generally, state applications Nos.679887-F and 679887-G.

After this Court's ruling in **Trevino,supra,**Petitioner filed two more state applications raising the ineffective assistance of trial counsel claims complained of herein. See,generally state applications Nos.679887-S and 679887-T. The (TCCA) dismissed the applications as being procedurally defaulted under Tex.Code Crim.Proc, art. 11.07, on April 8, 2015 and July 8, 2015, respectively.

Petitioner contends that his claims of trial counsel's ineffectiveness are substantial claims (meaning they have merit). The claims were not raised on direct appeal, instead in the initial review collateral proceeding without the assistance of a lawyer. For the reasons stated in **Trevino,supra,**a legal basis is provided to allow a federal habeas court to hear Petitioner otherwise state defaulted claims regarding his trial counsel's ineffectiveness.**Id.**

VI.

FACTS SUPPORTING PETITIONER'S CLAIMS

On August 11, 1986, Petitioner was released on parole and after being out less than a year,he had become addicted to CRACK COCAINE. He initially admitted himself into St.Joseph Hospital, west Oaks Hospital and finally his parole officer had him admitted at the Texas House(now Southeast Tex.Transitional Center)However,within a few days of being released from these facilities Petitioner

was right back abusing CRACK. The Borad of Pardons & Paroles kept documentation of Petitioner's admittance at each facility and the many failed U.A. testings but at no time did the board recommend parole revocation. The board allowed this illegal use of drugs to continue for almost 7 years until the addiction had cause some serious consequences.

On November 13, 1993, Eugene Williams and Petitioner had been using 'CRACK'. After they had spent all of their money on 'CRACK' Williams drove to a Burger King restaurant whereas Petitioner went inside and robbed the cashier by faking as if he had something underneath his jacket. Petitioner told the cashier to open the register and when she did he grabbed the money out of the register and fled. They went bought more 'CRACK' with the money. After they ran out of 'CRACK' and money they begin riding around looking for away to get some more money for 'CRACK'. The craving for the 'CRACK' had taken complete control of their rational thinking. While riding around they were pulled over and arrested by Humble Police Officers around 4:00 a.m. Petitioner was charged with aggravated robbery by using a firearm. Williams was immediately released.

After Petitioner's arrest he told Sherra Miller his court appointed counsel that he and Williams has been doing 'CRACK' prior to him committing the robbery. He told her that he did not have a weapon of any sort and in spite of that he had been charged with aggravated robbery by using a firearm. Petitioner asked Miller to help him get into CENIKOR DRUG TREATMENT PROGRAM. Miller told him that they weren't going to accept him because of his prior violent criminal history. Petitioner told Miller that if the cashier con-

tinued to lie about seeing a gun he was going to take the stand and tell the jury that the cashier was his friend and that she had freely given him the money and that she was a party to the theft.

On November 29, 1994, during Petitioner's trial, he took the stand and told the jury that the cashier was his friend, that she had actually given him the money freely and that she was a party to the theft.He told the jury that he never threaten the cashier in any way nor did he ever display a weapon to her in any way.(Reporter's Record Vol.4, pp. 20 & 21). The jury found Petitioner guilty of aggravated robbery by using and exhibiting a firearm as charged in the indictment.

Approximately 45 minutes after the jury returned its guilty verdict trial counsel proceeded straight into sentencing phase.She was wholly unprepared for sentencing. Counsel had not discussed any sentencing strategy with Petitioner. She did not advise Petitioner of his right to testify or make a determination whether he wished to exercise his right. Counsel otherwise, did not investigate, develop, or present any mitigating evidence at sentencing or inquire whether Petitioner had any character witnesses to testify on his behalf and present such testimony at sentencing. The jury assessed Petitioner's punishment at life imprisonment.

VII.

REASONS FOR GRANTING THE PETITION

A. Petitioner Received Ineffective Assistance From Trial Counsel Deficient Performance That Violated The Sixth Amendment By The Following Omissions:

(1) failure to prepare for sentencing; (2) failure to discuss any sentencing strategy with Petitioner; (3) failure to advise Petitioner of his right to testify at sentencing and determine whether he wished to exercise his right; (4) failure to investigate, develop, or present mitigating evidence at sentencing; and (5) failure to inquire whether Petitioner had any character witnesses to testify on his behalf and present such testimony at sentencing.

LEGAL STANDARDS

The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. See **Kimmelman v. Morrison**, 477 U. S. 365, 374, 106 S.Ct. 2574, 91 L.Ed.2d 305(1986);see also **United States v. Cronic**, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657(1984)("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.") Under **Strickland v. Washington**, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.2d 674(1984), a reviewing court must decide whether **(1)** an attorney's **performance** fell below an objective standard of reasonableness and **(2)** actual **prejudice** ensued.

Given the fact-dependant nature of the inquiry, **Strickland's 'prejudice prong'** entails the application of broad principles, not mechanical tests. **Strickland** established that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694; see also **Rompilla v. Beard**, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360(2005); **Yarborough v. Gentry**, 540 U.S. 1, 3, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Beyond that bare outline definition, a court must consider the possibility of **prejudice** against all the discrete circumstances that a criminal defendant faced at trial. See **Wong v. Belmontes**, ___U.S.___,130 S.Ct. 383,386, 175 L.Ed.2d 328 (2009)("in

evaluating [**Strickland prejudice**], it is necessary to consider all the relevant evidence that the jury would have had before it."); **Strickland**, 466 U.S. at 695("In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.") The **prejudice** inquiry operates in the context of the reasonable-doubt standard; in other words, a defendant must show "reasonable probability that...the factfinder would have had a reasonable doubt respecting guilt." **Strickland**, 466 U.S. at 695. This requires showing "at least one juror would have" entertained reasonable doubt. **Wiggins v. Smith**, 539 U.S. 510, 513, 123 S.Ct. 2527, 156 L.Ed.2d 471(2003);see also **Loyd v. Smith**, 899 F.2d 1416, 1426 (5th Cir.1990)("Paraphrased,[to deny relief] the reviewing court must be confident that at least one juror's verdict would not have been different had the new evidence been presented.").

In assessing **prejudice**, however, a court cannot focus solely on whether the outcome of trial may have been different. In **Lockhart v. Fretwell**, 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed.2d 180 (1993), the Supreme Court observed that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or reliable, is defective." See also **Goodwin v. Johnson**, 132 F.3d 162, 174 (5th Cir. 1997)("[T]he presence or absence of **prejudice**, both with respect to claims of ineffective assistance of counsel at the trial and appellate levels, hinges upon the fairness of the trial and the reliability of the judgment of convictionresulting therefrom."); **Cf. Williams v. Taylor**, 529 U.S. 362, 393, 120 S. Ct. 1495, 146 L.Ed.2d 389(2000)

(reaffirming that **Strickland** "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"). Thus, "**Strickland's prejudice** inquiry is process-based: Given counsel's deficient performance , do we have confidence in the process afforded the criminal ly accused?" **Virgil v. Dretke,** 446 F.3d 598,612 (5th Cir.2006)

This petition includes several claims of trial level ineffective assistance of counsel caused by counsel's deficient performance as pointed out above. Firstly, Petitioner contends that the Court should presume that he was prejudice when his trial counsel made no attempt to prepare for sentencing. The trial records shows that approximately 45 minutes after the jury returned its guilty verdict, counsel proceeded straight into the sentencing phase. See TRIAL DOCKET SHEET at **APPENDIX "B".** Counsel was wholly unprepared and obviously had no intention of **presenting any mitigation factors** by counsel's response to the court's inquiry.

> THE COURT: Does either side have any evidence they wish to offer on punishment?
> COUNSEL: The defense rests, Your Honor.(Reporter's Record Vol.5, pp.7-9).

It is also, very apparent that counsel had not done any investigating or develop any evidence to present as mitigating circumstances within the 45 minutes break after the guilty verdict, before sentencing begin. It appears that counsel's only sentencing strategy was to sit-in as a "warm body" attorney and make no attempts to test the prosecution case, thus the Court cannot presume that counsel's strategy was sound. See **Cannon v. State,** 252 S.W.3d 342, 349-50(Tex. Crim.App.2008)(presuming prejudice where defense counsel refused to participate in defendant's trial after court denied his motion for

a continuance); see also **Bell v. Cone**, 535 U.S. 685, 696-97, 122 S. Ct. 1843, 152 L.Ed.2d 914 (2002)(noting that defense counsel's failure to test the prosecution's case may lead to a presumption of prejudice).

Counsel owed Petition a duty to prepare for sentencing to try to position him for the most favorable sentence possible. Counsel failed in all aspects of her duty by making no attempt to discover, develp, or present mitigating circumstances to test the prosecution's argument for a life sentence. No competent, professional attorney would have taken such nonchalant approach with their client's best interest in mind. Thus, counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability, sufficient to undermine confidence in the outcome that, but for counsel's deficient performance, the result of the proceeding would have been different. See **Strickland,supra.** again.

Petitioner received a life sentence, the maximum sentence available for his offense. In sum, based alone, on counsel's performance or nonperformance, however the court recognize her actions in this case, the court must presume that Petitioner was prejudice from his counsel's performance or nonperformance.

Secondly, Petitioner contends that trial counsel's deficient performance caused prejudice because there was a reasonable chance that had counsel advised him of his right to testify or make a determination whether he wished to exercise his right he would have testified and that there is a reasonable probability that his testimony would have produced significant mitigation evidence that would have presuaded the jury to assess a less severe sentence, oppose to the maximum sentence of life in which he received.

By counsel failure to prepare Petitioner to testify, he was denied an opportunity to express how remorseful and shameful he was for trying to implicate the 17 high school cashier as a party to theft and taking her through such a horrific ordeal. During closing arguments prosecution made the following plea to the jury:

> MR. BENNETT: "And I'm going to ask you to give a life sentence to Mr. Lexter Kossie in this case. Not only for what he did, well, it is for what he did, but keep in mind he didn't come in and just hold the State to their burden, and it is perfectly legitimate to do that, and I encourage anybody who is not guilty to hold the State to their burden, **but he got up here and told you a blatant lie and tried to drag that young woman down with him. That tells you what kind of man Lexter Kossie is**"

(Reporter's Records Vol. 5, pp.17 & 18)

The prosecutor told the jury to not forget that Petitioner had lied to them and that he had tried to drag that 17 year old girl down with him. By counsel refusing to let Petitioner testify, he was prejudiced because the jury took his silence as being unremorseful and unsympathetic, deserving nothing less than life imprisonment for such unrepentant behavior. Counsel should have inquired into whether Petitioner wanted to exercise his right to testify before refusing to let him testify. See;**Rock v. Arkansas**, 483 U.S. 44, 49-52, 97 L.Ed.2d 37 (1987)(right to testify is personal to defendant and may not be waived by counsel). see also;**United States v. Mullins**, 315 F.3d 449, 452 (5th Cir.2002)(right to testify is **fundamental** to defendant and may not be waived by counsel).see also;**Owens v. United States**, 483 F.3d 48,58-59(1st Cir.2007)(right to testify may not be waived by counsel; furthermore **counsel has an obligation to inform a defendant of his right to testify**; and **a failure to do so constitutes deficient performance**).(remand for a hearing).

Counsel owed Petitioner a duty to explain to him that he had a right to testify and to inquire into whether Petitioner wanted to exercise that right. Counsel failed in all aspects of her duty by refusing to let Petitioner take the stand to show how remorseful and shameful he was for what he had done. No competent,professional lawyer would have not let their client take the stand during the punishment phase under similar circumstances of this case. Thus,counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability, sufficient to undermine confidence in the outcome that, but for counsel's defcient performance, the result of the proceeding would have been different. See; **Strickland,supra,** again.

Thirdly, Petitioner contends that his trial counsel's deficient performance caused prejudice because there was a reasonable chance that an adequate invesigation would have produced mitigation evidence that would have persuaded the jury to assess a significant less severe sentence, oppose to the maximum sentence of life that he ultimately received. This contention is predicated upon the following omissions whereas counsel failed **(1)** to prepare Petitioner to testify; **(2)** seek out character witnesses and **(3)** investigate Petitioner's history of alcohol and substance abuse.

(1) Counsel should prepare Petitioner to take the stand to let the jury know that he was under the influence of 'CRACK COCAINE' before committing the robbery and had it not been for the craving for more 'CRACK' he would not have committed the crime. This would have given the jury an opportunity to appraise Petitioner's moral culpability during the robbery as mitigating factors. Mitigat-

factors are any relevant circumstances or facts that reduce a defendant's blameworthiness in the eyes of the jury.See; Black's Law Dictionary 277 (9th ed.2009). Here counsel should have spent a significant amount of time preparing a case that portrays Petitioner as deserving sympathy. Article 37.07,§ 3(a), of the Texas Code of Criminal Procedure is "one of the guiding principles for the admissibility of evidence at the punishment stage of trial." **Sunbury v. State,** 88 S.W.3d 229, 233(Tex.Crim.App.2002)(citing **Rogers v. State,** 991 S.W.2d 263, 265(Tex.Crim.App.1999)). Pursuant to Article 37.07, § 3(a)(1), "evidence may be offered by the State and the defendant as to **any** matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. art.37.07, § 3(a)(1). Because the statute does not specifically define what constitute a mitigating factor, counsel was free to bring up whatever she considered important. Thus, counsel could have easily brought out the fact that at the time of the robbery, Petitioner's capacity to appreciate the criminality of his conduct or to follow the law was impaired as a result of mental illness or intoxication.See; TEX. PENAL CODE, § 8.04(b)("evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried".)see also; **Eddings v. Oklahoma,** 455 U.S. 104, 107-15, 102 S.Ct. 869,873-78, 71 L.Ed.2d 1, 6-12(1982)(holding that the state may not prevent the sentencer from considering any relevant mitigating factor).

(2) Petitioner contends that his trial counsel's deficient performance caused prejudice because there was a reasonable chance that Petitioner's two character witnesses' testimony would have produced

mitigation evidence that would have persuaded the jury to assess a significant less severe sentence, oppose to the maximum sentence of life that he uultimately received. Trial counsel owed Petitioner a duty to inquire into whether he had character witnesses that would any mitigating evidence for the jury to consider in assessing the appropriate punishment. The court must be very mindful that mitigating factors are not limited to events surround the crime. Outside events and circumstances, such as childhood abuse or personality disorder, can also be relevant. See; **e,g.,Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256(1989) It was crital for counsel to present as many of these factors as possible since they would help make the jurors feel that a life sentence would be too severe of a punishment in Petitioner's case. The importance of these mitigating factors demonstrates another reason why it was important for counsel to seek out Petitioner's character witnesses and prepare them to testify. Petitioner had at least two character witnesses who had firsthand knowledge of his extensive battle with his 'CRACK' addiction and his out-of-control character while under the influence. Petitioner's wife JoAnn Kossie has provided a sworn to and notarized affidavit stating in pertinent parts as follows:

> "Since Lexter's release from prison in 1986, he has been in and out of several drug treatment facilities for abuse of alcohol and crack cocaine. Whenever he was on crack and alcohol he was like a man insane. Sometimes he would spend his entire pay check on crack. Then he would stay up days and nights pawning, beggibg, borrowing, stealing and selling everything he could get his hands on to buy more crack.
> "In my opinion, once Lexter was under the influence of crack the craving for more crack made him lose all self-control and had he not been under the influence of crack he would not have committed the offense in which he was convicted for in Cause No.679887. I personally have witnessed Lexter being a law abiding citizen when he was not on crack and at no time did he do the insane things that he does while under the influence of crack cocaine.
> "Had I been consulted by defense attorney prior to Lexter's sentencing trial, I would have been able to provide trial testimony in regards to Lexter's

extensive crack cocaine and alcohol addiction in which the jury could have possibly considered in mitigating punishment. I would have also been able to provide trial testimony in regards to our marriage and the three (3) children we had at that time of ages 10 month, 3 and 13 years old, how great a husband and father he was to me and our children when he was not on crack, and I am willing to do so in the future if needed."

See AFFIDAVIT OF JOANN KOSSIE at **APPENDIX "C".**

Petitioner's mother Lucinda Kossie also provided a sworn to and notarized affidavit stating in pertinent parts as follows:

"Prior to Lexter robbing the Burger King he had admitted himself into several drug abuse facilities, namely: St. Joseph Hospital, Herman Hospital, and West Oaks Hospital, for his chronic abuse of alcohol and crack cocaine. After an endless battle with his addiction his parole officer had him admitted at the Texas House a treatment facility for parolees. Lexter was still unable to overcome his dependency on alcohol and crack cocaine. I did not personally see Lexter pawning, stealing or selling things to get crack but as a mother I knew he was and that one day he would get into serious trouble because of his dependency on crack."

"In my opinion once Lexter was under the influence of crack he lost all self-control and had he not been under the influence of crack on November 13,1993, he would not have committed that robbery offense. Crack had away of making Lexter's behavior irrational and to the point where I questioned his sanity."

"Had I been consulted by the defense attorney prior to Lexter's sentencing trial, I would have been able to provide trial testimony in regards to Lexter's extensive drug and alcohol abuse which the jury would have considered for mitigating his punishment. I am still, willing to do so in the future if needed."

See AFFIDAVIT OF LUCINDA KOSSIE at **APPENDIX "C".**

Petitioner contends that both witnesses have provided mitigation factors that probably would have help in convincing the jury that Petitioner would not have committed the robbery if not for his addiction and therefore he deserves sympathy in assessing punishment. In **Robinson v. California**, 370 U.S. 660, 667, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962), the Court held that("imprisonment for being a drug addict was cruel and unusal"). The Court based its holding not upon the method of punishment, but on the nature of the "crime". ("Because drug addiction is an illness which may be contracted involluntarily, imprisonment for ninety days is not, in abstract, a pun-

ishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold".

Counsel owed Petitioner a duty to inquire into whether he had character witnesses and if so, whether they could provide mitigating evidence in which the jury could consider in assessing punishment. Counsel failed in all aspects of her duty by not discussing any sentencing strategy with Petitioner. No competent, professional lawyer would have not inquired into whether their client had witnesses for the punishment stage of trial. Thus, counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability, sufficient to undermine confidence in the outcome that, but for counsel's deficient performance, the result of the proceeding would have been different. See; **Strickland,** again.

(3) Petitioner contends that his trial counsel's deficient performance caused prejudice because there was a reasonable chance that an adequate investigation of his parole file, medical records, and background would have produced mitigation evidence that would have persuaded the jury to assess a significant less severe sentence, oppose to the maximum sentence of life that he ultimately received.

After Petitioner's arrest he told his trial counsel that he had been doing crack cocaine prior to the robbery. He also told her that he had been in drug treatment at St. Joseph Hospital, Herman Hospital, West Oaks Hospital and that his parole officer had him admitted to Texas House for treatment. Petitioner asked counsel to help him get in CENIKOR DRUG TREATMENT PROGRAM but she told him that they weren't going to let him in because of his prior violent criminal history. Petitioner had at this point provided counsel with sufficient leads

to start her investigation. The hospitals would have verified that Petitioner had been admitted for 'CRACK COCAINE' abuse and with a phone call to Petitioner's parole officer she would have discovered documentation also of the treatment facilities in which Petitioner had been admitted. Any competent, professional lawyer having their client's best interest in mind would have then consulted an expert in substance abuse or hired one. It is highly probable that an expert would have provided potential mitigation evidence to show at the time Petitioner committed the robbery, his capacity to appreciate the criminality of his conduct or to follow the law was impaired as a result of mental disease or defect, or intoxication of 'CRACK COCAINE'. Dr. Harry J. Bonnell,M.D., has provided the following expert opinion,("Chronic usage of cocaine may lead to personality changes,..and psychosis.This can result in the craving for cocaine to take control of rational thinking and make the person more capable of committing crimes and other illegal behaviors") Crack is a very highly addictive drug and chronic usage could cause a person to commit crimes to for money to buy more crack to satisfy the addiction. The jury needed to know this and coming from an expert probably would have help the jury assess the appropriate punishment in this. CRACK COCAINE as pointed out is a very highly addictive drug.

Whether CRACK COCAINE is one of the two most addictive drugs depends on who is consulted. The general consensus is that a legal drug, nicotine, heads the list, based on likelihood of addiction (96.5%) and difficulty of withdrawal. See, e.g., Rob Crane, MD,The Most Addictive Drug, the Most Deadly Substance: Smoking Cessation Tactics for the Busy Clinician, 34 PRIMARY CARE: CLINICS IN OFF. PRAC., 117-35 (March 2007). The next two highly addictive drugs are

illegal: crack cocaine (95.5%) and "ice" (92.5%), the form of methamphetamine that is smoked. They are variously listed as the second and third most addictive drugs. They are followed by crystal meth (89.5%), the injected form of methamphetamine, as the fourth most addictive drug. See, e.g., John Hastings, Relative Addictiveness of Various Substances, IN HEALTH, Nov/Dec 1990("To rank today's commonly used drugs by their addictiveness, we asked experts to consider two questions: How easy is it to get hooked on these substances and **how hard is it to stop using them?** Although a person's vulnerability to drug also depends on individual traits-physiology, psychology, and social and economic pressure-these rankings reflect only the addictive potential inherent in the drug. The numbers below are relative rankings, based on the expert's scores for each substance [+/-1%]: 100 Nicotine [,] 99 Ice, Glass(Methamphetamine Smoked)[,] 98 Crack [,] 93 Meth(Methamphetamine injected) [,] 85 Valium (Diazepam)...") See also(last visited Dec 9, 2009)(same); Blurtit, What Are the Most Addictive Drugs?(last visited Dec 9, 2009)(nicotine, crack, ice/glass, crystal methamphetamine, oxycodone).

Petitioner contends that trial counsel's deficient performance caused prejudice because he was prevented from introducing evidence of his insanity that was caused by his crack addition. The evidence was there and with just a minimal investigation of Petitioner's background counsel would have discovered his medical records, parole file containing documentation of his addiction and family members having firsthand knowledge of the insanity of Petitioner while under the influence of crack. See, **Brown v. Sternes**, 304 F.3d 677, 693-98 (7th Cir. 2002)(noting that 'attorney have an obligation to

explore all readily available sources of evidence that might benefit their client [,]" and concluding that counsel who had access to defendant's medical records 'had a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems," failure to do so was ineffective assistance of counsel); see also, **Bouchilon v. Collins**, 907 F.2d 589, 595-97 (5th Cir.1990) (trial attorney who failed to do any investigation into client's medical and mental history after he had been informed of prior hospitalization...was constitutionally ineffective for failing to make adequate investigation...).

Counsel owed Petitioner a duty to develop the most powerful mitigation case possible. However, during closing arguments of the sentencing stage, it was evident that counsel had failed in all aspect of her duty to present mitigating factors to persuade the jury that her client deserve sympathy. This was all because counsel had fail to prepare Petitioner to testify; fail to seek out character witnesses; and fail to develop and investigate for potential mitigating evidence. Instead, counsel put on a halfhearted closing argument which had life sentence written all-over it as shown below:

> COUNSEL: He has already paid for those things that he did. He has paid his debt to society, not once, but twice already. He's paid his debt to society by serving time for the things that he did and by being punished through the penal system. The second way that he's paid for that already before you even render your verdict on punishment is that because of his prior convictions, because of his prior stay in the penitentiary then the punishment range has been elevated from 5 years to 99 years, up to 15 to 99 already. So that's the second way he's already been punished. I would ask you, please, not to punish him a third time for what he's done in the past. He's already paid for that...and I urge you and submit to you that the appropriate punishment in this case falls at the bottom range, at the minimum range and ask you to render a 15-year sentence as your punishment in this matter.

(Reporter's Records Vol. 5, pp. 9-12)

Because of counsel's failure to investigate she fail to discover and present mitigating factors of Petitioner's employment history-that he was a certified lab optician-that he was employed at the time of the offense-that he was married-that they had been together almost 25 years-that she still supported him-that they had 3 children, ages 3 months, 3 years old, and 13 years old. That Petitioner was a loving and caring husband and father to his wife and children-that his wife and children loved him deeply-that he would not have committed the robbery had he not been on crack-that he had sought help by admitting himself into several drug treatment facilities-that he could not overcome his extensive battle with crack-and that his addiction to crack was an illness that was contracted involuntarily.

It's obvious that counsel had no intentions of presenting any mitigating factors in this case, otherwise she would not have proceeded straight into the sentencing trial 45 minutes after the jury had returned its guilty verdict. Thus, this Court must presume that Petitioner was prejudiced. See, **Cannon** and **Bell,supra**, again. see also, **Wiggins**, 539 U.S. at 536 (In assessing prejudice under **Strickland** in context of a failure to investigate claim, "we evaluate the the totality of the evidence-both that adduced at the trial, and the evidence adduced in the habeas proceedings" in determining that, had the jury been confronted with the uninvestigated evidence, "there is a reasonable probability that it would have returned with a different sentence" or verdict)(**emphasis in original**; quoting **Williams v. Taylor**, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

In **Conclusion**, Petitioner contends, with even minimal investigation by trial counsel, at least one may well have, as this Court has held that evidence of mental illness and sustance abuse is relevant to assesing moral culpability. See, **Rompilla**, 545 U.S., at 393; **Porter**, 558 U.S., at 43-44. Instead, the jury heard nothing that would humanize Petitioner or allow them to accurately gauge his moral culpability.

There is nothing in the record that would support the conclusion that counsel chose to proceed into sentencing and not to present mitigation factors after careful investigation and consideration of Petitioner's case. Instead, counsel for the most part did not even take the first step of interviewing witnesses or requesting medical records and ignored pertinent avenues for investigation of which she should have been aware. See, **Porter v. McCollum**, 558 U.S. 30, 39 (2009)(per curiam)(noting that even if the defendant is "uncooperative, ...that does not obviate the need for defense counsel to conduct **some** sort of mitigation investigation (**emphasis in original**).

Finally, Petitioner contends that under the facts of this case, even with his extensive criminal background there is a reasonable probability the jury would not have voted for a life sentence had counsel presented the mitigation factors shown in this instant petition. Furthermore, if Petitioner had an attorney in the initial collateral review proceeding he/she would have uncovered evidence showing that trial counsel's blank investigative efforts were deficient, and that Petitioner was prejudice therefrom. Thus, Petitioner's claims regarding trial counsel's ineffectiveness fall well within the definition of substantial as contemplated in **Trevino** which al-

lows a federal habeas court to find cause to excuse state procedural defaulted claims of ineffective-assistance-of-trial-counsel if in the initial collateral review proceeding counsel was ineffective or there was no counsel. **Id.** In sum, this Court must remand this petition to the United States District Court for the Southern District of Texas-Corpus Christi Division where the Petitioner is being held to determine whether there is cause to excuse the state procedural defaulted claims of ineffective assistance of trial counsel.

Respectfully submitted,

SIGNED ON THE 21st DAY OF JAN, 2020.

/s/ Lexter Kossie
Lexter Kennon Kossie
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Pro se Petitioner

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Petitioner pray that the court will remand this habeas proceeding to the district court to make a determination whether Petitioner's state procedural defaulted claims of trial counsel ineffectiveness are excuse as outlined in **Trevino v. Thaler, 133 S.Ct. 911 (2013).** Petitioner further pray that the Court will grant any other and further relief in which the Court deems is appropriate in this case. Petitioner will forever pray.

/s/ Lexter Kossie
Lexter Kennon Kossie

INMATE'S UNSWORN DECLARATION

I, **Lexter Kennon Kossie#700661,** declare under the penalty of perjury that the contents of the foregoing are true and correct to